

No. 13,675

IN THE

United States Court of Appeals

For the Ninth Circuit

EDWARD B. CALDERON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

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JURISDICTIONAL STATEMENT

This is an appeal by Edward B. Calderon from a judgment of the District Court for the District of Arizona entered on November 10, 1952, (R. 17), adjudging the Defendant guilty as charged and convicted in Counts 1, 2, 3, and 4 in the Indictment (R. 3) wherein the Defendant was charged with offenses of violating Title 26, United States Code, Section 145(b)(c) (Income tax evasion). Notice of Appeal was filed by the Defendant on November 18, 1952 (R. 17). Jurisdiction of the District Court was invoked under Title 18, U.S.C., Section 3231 and of this Court under Title 28, U.S.C., Sections 1291 and 1294.

STATEMENT OF THE CASE

Counts 1 through 4 of the Indictment herein filed October 29, 1951, alleged in substance as follows (R. 3):

The Defendant did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for the calendar years 1946, 1947, 1948 and 1949 in violation of Title 26, U.S.C., Section 145 (b)(c).

It should be noted that the Defendant is a person of Mexican origin who was brought to the United States by his father in 1916, the Defendant then being 8 years of age. Thereafter, he completed an eighth grade education and two months of high school when he was required to leave school to assist in the care of his father and the support of his brothers and sisters. From 1926 until 1935 the Defendant worked at common labor and as a fry cook, earning from \$50.00 to \$100.00 per month (R. 152-154). In the year 1935, and while the Defendant was working as a fry cook in Douglas, Arizona, he made a loan of \$7.00 for which he took two small counter slot machines as security. The borrower never returned to repay the loan, and the Defendant placed one of the machines in operation in the cafe where he was employed (R. 154-156).

It was evident that, though the Defendant was lacking in education, he possessed a definite mechanical aptitude and quickly developed an appreciation of the profitable operation of this type of equipment. It was not long before the Defendant acquired additional coin-operated machines, juke boxes and pin-ball games; he was soon devoting his entire time to this operation and left his employment as a fry cook.

As the Defendant began to accumulate money in addition to that necessary for the purchase of new machines, he deposited the same in a trunk located in his home (R. 157) until he was eventually able to secure the use of a safe, at which time he began to deposit considerable sums of cash in the safe (R. 163).

The complete lack of education and lack of any previous business background has made it necessary for the Defendant, a man only able to speak broken English even today, to rely on others completely for accounting and legal advice. This the Defendant commenced to do early, and, in connection with the matters herein involved, relied on a local bookkeeper, Eugene C. Verdugo, (R. 165) who fully realized that the Defendant knew nothing about bookkeeping or business affairs (R. 134). The Defendant attempted to comply with the advice and suggestions of this bookkeeper (R. 141 and 165-166) but the result was most unsatisfactory (R. 89-90); the books and records were incomplete and so poorly kept that the consequent tax returns were also undoubtedly faulty as prepared by this same bookkeeper.

Faced with the foregoing situation, agents of the United States Bureau of Internal Revenue made an investigation of the income tax returns of the Defendant for the years 1943, 1944, 1945, 1946, 1947, 1948 and 1949 (Defendant's Exhibit B). As a result of this investigation, the agents compiled a "net worth statement" covering these years. On the basis of this "net worth statement" the Defendant was charged with income tax evasion for the years 1946, 1947, 1948 and 1949. At the time of trial in the District Court and as appears in the Minute Order on page 8 of the Transcript of Record, it was stipulated by counsel that with reference to the assets and liabilities of the Defendant as of December 31st of each of the years, 1945 through 1949, with the exception of the items of assets designated as "cash on hand" and "cash in the bank" that the Government witness, Special Agent Lloyd M. Tucker, might testify from his reports as to the total of the items going to make up the said assets and liabilities without producing any supporting documents or records. It was further stipulated as to items of "disbursements" and "expenditures" made by the Defendant in the years enumerated which are claimed by the Government to be non-deductible, the said witness might testify as to the total of such items for the years enumerated without producing any supporting records.

During the course of the trial in the District Court and prior to the proof of the corpus delicti and the commission of any crime whatsoever and over the objection of the Defendant's Counsel (R. 107) the Court permitted the introduction into evidence of Government's Exhibit 11, purporting to be an admission of the Defendant in the form of an affidavit.

The "cash on hand" appearing in the "net worth statement" upon which the Government based its case, for any given year in such statement, was never established during the course of the trial, accurately or otherwise. At the close of the Government's case, counsel for the Defendant moved that the case be dismissed on the basis that the Government had failed to prove its case, such motion being based on the failure of the Government to accurately prove the "cash on hand" for any year set forth in the "net worth statement" which made the statement valueless as evidence therein and for the further reason that the Court had erroneously admitted the introduction of Government's Exhibit 11, the purported written admission of the Defendant (R. 141-142).

Again at the close of the Defendant's case, counsel for the Defendant renewed the motion to dismiss on the same grounds and for the same reasons (R. 198).

In each instance the Court ordered that the motion be denied.

Thereafter the Court instructed the jury, which retired for deliberation and subsequently returned, having found the Defendant guilty as charged in all counts of the Indictment.

The Defendant was sentenced to pay a fine in the amount of \$7,500.00 on Count 1 and \$2,500.00 on Count 4 of the Indictment, no jail sentences being imposed. Imposition of sentence on Counts 2 and 3 was suspended on condition the fines imposed on Counts 1 and 4 were paid within 5 days, that all taxes and assessments thereafter levied be paid, and that the Defendant conduct himself as a law abiding citizen (R. 16-17). Notice of Appeal was filed by the Defendant November 18, 1952, and the Designation of Record on January 8, 1953.

SPECIFICATION OF ERRORS

1. The District Court erred in permitting the purported written admission of the Defendant (Government's Exhibit 11) to be introduced in evidence (R. 107) over the objections of Defendant's counsel (R. 107) for the reason that such a statement of admission, if it be an admission, may not be properly allowed in evidence in a case of the nature herein until the corpus delicti has been established otherwise by independent evidence.

2. The "net worth statement", as prepared by the Internal Revenue Agents (R. 60), was testified to and the figures therefrom were received in evidence (R. 61-71), over objection of Defendant's counsel and after a request by Defendant's counsel to examine the witness on voir dire (R. 62), although it affirmatively appeared from the testimony of the Government's witnesses that the original asset figures were erroneous and not based on fact (R.79-82 and 85-86 and 138).

3. The District Court erred in permitting the witness, Rex E. Webb, to testify to the computation of the Defendant's taxes (R. 99-104) based on the "net worth statement" noted in Specification of Error 2 above over the objections of Defendant's counsel (R. 97-98) for the reason that the figures upon which such taxes were based were secured from the "net worth statement" which of itself was incompetent and not admissible, thus compounding the error previously committed in admitting the "net worth statement".

4. The District Court erred in denying Defendant's Motion to Dismiss at the close of all the evidence (R. 198) as there was not sufficient evidence to present the case to the jury; the evidence did not disclose that a crime had been committed; the evidence did not prove that the specific crimes charged had been committed; the evidence did not prove that the Defendant had committed any of the crimes charged. A conviction will not be sustained, based on circumstantial evidence alone, where such circumstantial evidence does not exclude every reasonable hypothesis of the innocence of the Defendant.

5. The Verdict and Judgment of Guilty is not sustained by competent evidence.

ARGUMENT

SUMMARY

Although the foregoing errors cited by the defendant are five in number, one basic error was committed by the District Court which gives rise or establishes a foundation for the remaining errors. If this Court will examine Defendant's Exhibit B, the "Net Worth Statement" prepared by the agents of the Bureau of Internal Revenue, and the testimony of the Government's witness, Lloyd M. Tucker, appearing on pages 63 through 71 of the Transcript of Record herein, it will note the sum of \$500.00 appearing as "Cash on Hand" on December 31st of each year, beginning with 1943 and continuing through 1948, and thereafter the sum of \$1,971.50 appearing as "Cash On Hand" on December 31st, 1949. It is to be noted that the Government rested its entire case on this "Net Worth Statement"; and it necessarily follows that, if the "Cash On Hand" noted above is inaccurately given or has not been proven by the Government, (a) Specification of Error 2 is well taken in that the "Net Worth Statement" is inaccurate, incompetent and not admissible, (b) Specification of Error 3 is well taken in that the taxes computed by the Government witness, Rex E. Webb, as due the Government are based on the inaccurate, incompetent and inadmissible "Net Worth Statement", (c) Specification of Error 1 is well taken in that the purported admission contained in Government's Exhibit 11 is inadmissible without the "Net Worth Statement" and proper computation of taxes thereon to establish the corpus delicti or commission of a crime, the Government having presented no other evidence to prove the same, (d) Specification of Error 4 is well taken in that the Government consequently never established a prima facie case, and (e) Specification of Error 5 is well taken in that, the Government having failed to establish a prima facie case, no issue was left to submit to the jury and no competent evidence remained for the jury and court to consider upon which to base a Verdict and Judgment of Guilty.

The Specification of Errors were hereinbefore cited in numerical order as the same occurred during the course of the trial; however, for the purpose of clarity and logical presentation in the Argument, we

shall discuss the same in the order as they appear in this Summary, that is, (a), (b), (c), (d) and (e).

I.

THE "NET WORTH STATEMENT", AS PREPARED BY THE INTERNAL REVENUE AGENTS (R. 60), WAS TESTIFIED TO AND THE FIGURES THEREFROM WERE RECEIVED IN EVIDENCE (R. 61-71), OVER OBJECTION OF DEFENDANT'S COUNSEL AND AFTER A REQUEST BY DEFENDANT'S COUNSEL TO EXAMINE THE WITNESS ON VOIR DIRE (R. 62), ALTHOUGH IT AFFIRMATIVELY APPEARED FROM THE TESTIMONY OF THE GOVERNMENT'S WITNESS THAT THE ORIGINAL ASSET FIGURES WERE ERRONEOUS AND NOT BASED ON FACT (R. 79-82 and 85-86 and 138).

It was stipulated below as appears on pages 8 and 28-29 of the Transcript of Record that the Government witness, Special Agent Lloyd M. Tucker, might testify to the "Net Worth Statement" without producing any supporting documents or records with the exception of the items of assets designated as "Cash on Hand" and "Cash in the Bank". The items of assets designated as "Cash in the Bank" were substantially supported as shown by Mr. Tucker in Government's Exhibits 5, 6, 7, 8, 9 and 10; however, in passing we should like to point out discrepancies in these items which are indications of the carelessness of the agents in preparing the so-called "Net Worth Statement". The Government witness, Eugene C. Hampel, was asked the following questions and made the following answers (R. 47):

Q "Now, referring to the exhibit you have before you (Government's Exhibit 7), what was the balance in that account as of December 31st, 1949?"

A "Well, the 31st after the interest was posted, \$17,334.24."

Now, observe on the "Net Worth Statement" (Defendant's exhibit B) the item of \$18,034.24, being the fourth item down under the heading "December 31st, 1939." A further examination of Government's Exhibit 7 will disclose that at no time was there

any such balance in the savings account of the Bank of Douglas in the sum of \$18,034.24 as appears in the "Net Worth Statement".

Again, examine the item of \$688.91, being the second item down under "December 31st, 1945" of Defendant's Exhibit D and compare with Government's Exhibit 9 in relation to the testimony of Mr. Hampel on page 48 of the Transcript of Record:

Q "Now, this Exhibit 9, Government's Exhibit 9, is before you at this time?"

A "Yes."

Q "And that is the bank record of the checking account of Edward Calderon?"

A "That is right."

Q "That is his business account apparently?"

A "Yes."

Q "Calling your attention on that exhibit to the year of December 31st, 1945, will you tell me what the balance on that account shows?"

A "December 31st, 1945, shows a balance of \$693.91."

Proceeding to the next question and answer, it was asked by Mr. Hampel on the same page:

Q "What was the balance shown by that exhibit as of December 31st, 1947?"

A "December 31st, 1947, \$1,665.64."

However, see the item of \$1,713.78, being the second item down under "December 31st, 1947," of Defendant's Exhibit B.

See also the admission of Mr. Tucker, the Government witness, on page 75 of the Transcript of Record:

Q "Now, Mr. Tucker, then the net taxable income as shown by your "net worth statement" is wrong, isn't it?"

A "By this statement you are looking at?"

Q "Yes."

A "\$5.00 wrong one year and \$40.00 some the other year and \$700.00 in one year."

Q "And also it would be wrong by the amount of State Income Tax paid?"

A "Yes."

See also Mr. Tucker's admission on page 79 of the Transcript of Record to the effect that if the totals in the "Net Worth Statement" were wrong, the taxes ascertained by the Government Agents would also be wrong.

We shall now consider and discuss the most important single item upon which the Government's case must be sustained or rejected, namely, *the sum of \$500.00 appearing as "Cash on Hand" in Defendant's Exhibit B and as appearing in the testimony of Government witness, Lloyd M. Tucker, on December 31st of each year beginning with 1945 and ending with 1948.* As to the insertion of the sum of \$500.00 in the Defendant's Exhibit B, such item becomes self-evident by the mere examination of the exhibit. Notice, beginning at the bottom of page 58 of the Transcript of Record, that the witness, Lloyd M. Tucker, was asked if the Defendant, Mr. Calderon, told Mr. Tucker how much cash on hand he (the Defendant) had at the end of the various years beginning with 1945 and ending with 1949. In each case, except for the year 1949, Mr. Tucker stated that the Defendant had the sum of \$500.00 as cash on hand, and for the year 1949 the sum of \$1,971.50 as cash on hand. Again on page 60, Mr. Tucker testifies to the same thing. Then beginning on page 63 and ending on page 71, as Mr. Tucker testifies to the "Net Worth Statement" as a whole, he states that the Defendant had cash on hand of \$500.00 at the end of each year beginning with 1945 and ending with 1948 and the sum of \$1,971.50 at the end of the year 1949.

Next, let us examine the objections of Defendant's counsel to this testimony and also examine the *actual source* of these figures as testified by Mr. Tucker. See page 57 of the Transcript of Record:

Q "State the conversation."

A "Well, at the time we asked Mr. Calderon many questions, as I recall. I asked him when he was born and where he was born and he showed me a Certificate of Naturalization. He showed me how many children he had, what their ages were, and I asked him how he operated his household, how much money he spent each month for personal living expenses. *And I asked him how much cash he customarily carried about him* and he stated for many years it had been his habit to have cash on hand . . ." (emphasis supplied).

See page 62 where Mr. Herring, one of the Defendant's counsel, made the following objection:

"The point is, your Honor, this. That of course the items that go to make up this "Net Worth Statement" are based and have their basis and start with "Cash on Hand" and "Cash in the Bank". Unless that is correct the "Net Worth Statement" isn't worth anything because it starts on a false premise entirely. The question now is, he is to be allowed to testify from this thing without first laying the proper foundation to show the sources and correctness of his information to begin with. It is true he has related some conversation with Mr. Calderon. Due to the importance of this thing, if he is going to proceed this way I would like a chance to cross-examine him first on voir dire with relation to the very basis of this thing. Now if it can be established, there is nothing wrong in that; if it can't be established and the examination and insecurity or unreliability of the exhibit is shown, it shouldn't be testified from at all."

On page 79 of the Transcript of Record Mr. Tucker made the following general answers in regards the reliability of the "Net Worth Statement":

Q "Now, let's get back to this statement. You said, as I understand it, that if the cash on hand item as it appears in your net worth statement is in error than the whole thing is in error, that is right, isn't it?"

A "It would affect it, yes. It wouldn't make any of the other items wrong or right."

Q "Just make the total wrong all the way through?"

A "Yes, if the item was wrong."

Q "The total taxes, the total amounts Mr. Calderon is to be charged with would be wrong all the way through? It is true, isn't it?"

A "Yes, sir."

Q "Do you recall when you appeared on the trial of this case before you referred to some notes you had made to come to trial with?"

A "Yes, sir."

Q "You had made those notes, I think, in relation to some other notes you had and a report you made, is that correct?"

A "That is true."

Q "You made those typewritten notes for the purpose of refreshing your memory when you came to trial, is that right?"

A "Yes, sir."

Q "Mr. Tucker, before we go any further than that, isn't it true that when you talked to Mr. Calderon about the amount of cash he had on hand that *he told you he ordinarily carried around \$500.00 in his pocket?* Is that right? (emphasis supplied).

A "*That is true.*" (emphasis supplied).

Further down on page 80 following the foregoing conversation find the following questions and answers:

Q "As a matter of fact, you related here in answer to Mr. K. Berry Peterson's question a conversation with Mr. Calderon in

which you said that he had cash on hand ordinarily of about \$500.00. *Actually what Mr. Calderon said was he ordinarily carried that much in his pocket, didn't he?*" (emphasis supplied).

A "Yes, he said that." (emphasis supplied).

In reference to the notes of the witness, Lloyd M. Tucker, referred to in the foregoing questions and answers, see Defendant's Exhibit A. Note particularly that paragraph contained in such notes and reading as follows, "*On January 1, 1944, he had approximately \$500.00 cash in his pocket. He believes that because it is his habit to carry about that much money in his pocket at all times. He made a deposit to his savings account at the Bank of Douglas on January 4, 1950, of approximately \$1,900.00 That sum represented money which he had accumulated during the last month or so of the year 1949.*" (emphasis supplied.) Notice that Mr. Tucker was asked the following questions and made the following answers in reference to Defendant's Exhibit A at the bottom of page 82 of the Transcript of Record:

Q "But you had notes which you had taken immediately after this conversation?"

A "Yes."

Q "And from that you took these typewritten notes, is that correct?"

A "Yes, that is right."

An examination of the previous testimony and in particular the notes of Mr. Tucker discloses that Mr. Calderon at no time stated that he had \$500.00 "Cash on Hand." In fact, the only statement in this connection that he did make was that "*On January 1, 1944, he had approximately \$500.00 cash in his pocket.*"

For the explanation of Mr. Tucker's testimony to the effect that the Defendant had \$500.00 cash on hand at the end of the enumerated years, see the following questions and answers of Mr. Tucker on the bottom of page 85 of the Transcript of Record:

Q "In fact, these notes here on this exhibit is just about all he said about that, isn't it?" (Defendant's Exhibit B).

A "No, that is not quite right. *This item of cash in pocket, as I said before, is terminology. I didn't interpret he carried five hundred in his pocket at all times.* It is obvious that he had more cash at times because his savings account shows he deposited one thousand or two thousand or more at a time, so it is evident he had it the day before he deposited it and probably for days or weeks before. Of course at times he had more cash than that." (emphasis supplied.)

What a revelation was this answer of Mr. Tucker! Mr. Tucker "DIDN'T INTERPRET HE (Mr. Calderon) CARRIED FIVE HUNDRED IN HIS POCKET AT ALL TIMES." The fallacy of the Government's position is completely disclosed by this answer! The Defendant answered a question fairly and honestly to the effect that he usually carried the sum of \$500.00 in his pocket, it being necessary in the operation of his business, and was never asked as to the amount of money he maintained in his safe or on his business premises as we shall later discuss. More than this, the Defendant referred to "January 1, 1944," and never to the years involved under the Indictment and charges herein. At this point the refusal of the District Court to sustain the objection of Defendant's counsel on page 62 of the Transcript of Record and the error in refusing counsel permission to examine the witness on voir dire becomes apparent. Moreover, to refute Mr. Tucker's inference that the Defendant was making deposits all along and could not have had a great deal of cash on hand, see the testimony of Government's witness, Eugene C. Hampel, on page 45 of the Transcript of Record concerning Government's Exhibit 7:

Q "Mr. Hampel, handing you this exhibit to refresh your recollection, I ask you to examine it, particularly with reference to the years ending in 1943, along about in October of 1943, would you examine particularly the deposits with reference to that year. When does that record show the last deposit was made in that savings account during the year 1943, other than interest? I mean

the last deposit that was made to the account other than savings account interest.”

A “June 19.”

Q “June the 19th?”

A “Yes.”

Q “And how much was that deposit?”

A “\$700.00.”

Q “When does the next deposit appear? That is June 19th, 1943, \$700.00?”

A “Yes, sir.”

Q “When does the next deposit appear in that account other than interest?”

A “It is on October 19, 1945.”

Q “October 19th, 1945. And how much was deposited at that time?”

A “\$1,000.00.”

Q “So there was nothing deposited in that account between June of 1943 and October of 1945, is that correct?” (emphasis supplied).

A “That is correct, excepting the interest.” (emphasis supplied).

Let us examine Mr. Tucker’s testimony further beginning with the question at the bottom of page 85 of the Transcript of Record:

Q “It is entirely possible, from your knowledge of the circumstances in Douglas and from your knowledge of the music machine and coin machine business and from your investigation of this thing, that Mr. Calderon had as much as \$10,000.00 in his possession on January 1, 1945, isn’t it? It is possible?”

A “Well, it is possible he could or could not have had it. I can’t answer the question, Mr. Herring.”

Q "You don't know?"

A "All I know is what he told me he customarily had."

Q "In his pocket, \$500.00?"

A "He said in his pocket."

Q "Didn't Mr. Verdugo tell you Mr. Calderon kept cash in his safe?"

A "You asked me that question before and I am trying to remember. I can't. I seem to recall some discussion about it."

Q "Do you recall at the previous trial this question was asked and you made this answer — bottom of page 75 and top of page 76:

'Question: Didn't Mr. Verdugo tell you that Mr. Calderon kept cash in his safe?'

'Answer: Yes, Mr. Calderon told me that too.'

That question was asked and you made that answer?"

A "Oh, yes, that is my answer if the record shows that. *My recollection was evidently better then.* (emphasis supplied).

We have carefully reviewed all of the evidence and all of the testimony in the District Court involved herein and find absolutely no other foundation or source of information upon which Mr. Tucker might base his statement of \$500.00 cash on hand for the years enumerated. In other words, the completely unsupported conclusion of this witness and the arbitrary interpretation by this witness (R. 85) was permitted by the District Court, over the objections of counsel for the Defendant, to establish the all-important "Net Worth Statement". This testimony did not create circumstantial evidence, but, quite to the contrary, was mere guess, supposition and speculation which was completely unsupported. The statement of the Court in *U. S. vs. Fenwick, 177 F 2d 488*, most aptly applies herein:

"The weakness of the Government's position, stressed by the defendant, is the uncertainty of the propriety of the findings of defendant's net worth at the beginning of 1943. Of course,

before the increased net worth method of proof is effective, the net worth of the taxpayer at the beginning of the tax year must be clearly and accurately established by competent evidence. By this rule we must test the sufficiency of the evidence offered by the Government to establish defendant's net worth at the beginning of 1943. . . . There is no proof that he had not accumulated cash, or assets of other character over the 25 years during which he had been engaged in business. . . . The agent said on cross-examination that he had made no inquiry of defendant as to whether he had cash on hand accumulated from earnings from his business in the years prior thereto. . . . In other words, the evidence falls far short of proof that the property which the Government's agents assumed constituted all of defendant's net worth at the beginning of 1943, was in fact all of the property then owned by him.

The net worth expenditures method of establishing net income, set to be applied in this case, is effective only if the computations of net worth at the beginning and at the end of the question periods can reasonably be accepted as accurate since . . . no claim of evasion is based upon the deductions from gross income reported by the defendant, and since there is no evidence that the gross expenditures by the defendant in any year were made entirely from gross income of the business operations in such year, it was essential for the Government to present evidence that excluded, or tended to exclude, all other available sources from which the additional funds expended could have been derived, . . . the Government must rely almost entirely upon circumstantial evidence, that is to say, upon the circumstance of the expenditure of considerably more money in the years in question than the defendant took in. . . . The evidence, being circumstantial, must exclude every reasonable hypothesis other than the guilt of the defendant. . . . the cause should not have been submitted to the jury since it did not exclude the hypothesis that the funds used in making some of the expenditures might have been from sources other than current business income."

Again in the case of *Bryan vs. U. S.*, 175 F 2d 223, the Court adopted the following rule:

“The net worth-expenditures method of establishing net income, sought to be applied in this case, is effective only if the computations of net worth at the beginning and at the end of the question periods can reasonably be accepted as accurate.”

It is not necessary that we completely rely on the lack of the Government to establish the item of “Cash on Hand” in this case, for we have the *uncontradicted statements* of the Defendant himself as to the approximate amount of “Cash on Hand” in his possession at the end of December, 1945. See the questions and answers beginning in the middle of page 164 of the Transcript of Record:

Q “As a result of that practice of yours, did you build up quite a reserve of cash in your safe from time to time?”

A “Yes, sir, I did, sir.”

Q “Well, can you give us any idea how much cash you had in that safe about the end of December, 1945, let’s say?”

A “At the end of December, 1945, that was right after the war years, I could have accumulated maybe — I don’t know, maybe \$16,000 or \$17,000.”

Q “\$16,000.00 or \$17,000.00?”

A “Yes.”

See also the testimony of Government witness, Eugene C. Verdugo, at the bottom of page 138 of the Transcript of Record:

Q “During the course of these conversations did you tell them, or you told them, didn’t you, that Eddie kept from the very nature of his business quite large amounts of cash in his safe?”

A “I remember telling one of them, I don’t remember which one, Mr. Tucker or Mr. Webb, that he did carry cash, plenty of cash in his safe because of the nature of his business, he had to be making change, cashing checks and so forth for his locations.”

Then beginning in the middle of page 139 as to the attitude of the Government's agents, we find the following:

Q "Now, did Mr. Webb or Mr. Tucker when this discussion took place about the large amounts of cash he had to keep in his safe for business purposes, did they ever ask you how much he kept in his safe?"

A "No."

Q "Did they ask him in front of you how much he kept in his safe?"

A "Not in front of me."

Q "Mr. Calderon was there when one of these conversations took place, wasn't he?"

A "Yes."

Q "Did they show any further interest in any amount of cash he might have had in his safe at any time?"

A "Not in my presence."

An examination of the testimony as stated above by Mr. Calderon and by Mr. Verdugo coupled with the testimony of Mr. Tucker appearing on page 86 of the Transcript of Record fully discloses uncontradicted evidence to the effect that Mr. Calderon had considerable more cash on hand than that testified to by Mr. Tucker and also, referring to page 86, that Mr. Tucker, the Government agent, had reason to know this.

II.

THE DISTRICT COURT ERRED IN PERMITTING THE PURPORTED WRITTEN ADMISSION OF THE DEFENDANT (GOVERNMENT'S EXHIBIT 11) TO BE INTRODUCED IN EVIDENCE (R. 107) OVER THE OBJECTIONS OF DEFENDANT'S COUNSEL (R. 107) FOR THE REASON THAT SUCH A STATEMENT OF ADMISSION, IF IT BE AN ADMISSION, MAY NOT BE PROPERLY ALLOWED IN EVIDENCE IN A CASE OF THE NATURE HEREIN UNTIL THE

CORPUS DELICTI HAS BEEN ESTABLISHED OTHERWISE BY INDEPENDENT EVIDENCE.

If the Court will examine Government's Exhibit 11, it will discover what appears to be admissions of the Defendant to the effect that he knew he was not reporting all of his income. However, on pages 106, 124-125 and 126 of the Transcript of Record the testimony of Government witnesses shows that all of the matters contained in the so-called admission were tediously and carefully explained to Mr. Calderon in 1950, long after the income was not reported. Of course, after the explanation to this Defendant, even though he is uneducated and untrained, he realized what had occurred and with such knowledge signed the statement involved. A further examination of the statement will disclose to the Court that the Defendant did not state that he knew the income was unreported at the time that it was omitted from his tax return, because, as a matter of fact, it is apparent that he did not know of such fact at that time. Disregarding this question, let us determine whether the statement was admissible at all in the light of Paragraph I above.

As this Court stated in the case of *Spriggs vs. U. S.*, 198 2d 782:

"Whether this evidence, upon which the Judgment below must stand or fall, is to be regarded as a confession, or as admissions, or as extra-judicial statements, is of no consequence here. Under any name, they are insufficient to sustain the conviction, where there has been no independent proof of any crime having been committed. We deem it unnecessary, as appellant contends, in admitting this testimony of certain Government agents concerning statements made to them by appellant. Even if the admissibility of such testimony be assumed, *arguendo*, the Government case still falls far short of establishing the guilt of appellant by further evidence required by our decision in *Davena, Jr., vs. U. S.*, 198 F 2d 250."

Needless to say, the foregoing opinion of this Court cites many authorities sustaining this rule. When applying this rule to the present case we need only determine whether any independent proof

exists of any crime having been committed by the Defendant, Edward B. Calderon.

If the "Net Worth Statement" in evidence as Defendant's Exhibit B or as orally testified to by Government's witness, Lloyd M. Tucker, is competent, and also the testimony of Government witness, Rex E. Webb, as to the computation of tax thereon (R. 99-104), then, Government's Exhibit 11 is admissible. If the evidence and testimony concerning the "Net Worth Statement" and the computations thereon is not admissible, then the District Court erred in admitting Government's Exhibit 11.

We shall not burden the Court further with argument in this connection, as the same was exhaustively discussed under Paragraph I above. There can be no question but that the "Net Worth Statement" was improperly admitted in the oral testimony of Government witness, Lloyd M. Tucker, and that no independent proof of any crime having been committed was ever shown.

III.

THE DISTRICT COURT ERRED IN PERMITTING THE WITNESS, REX E. WEBB, TO TESTIFY TO THE COMPUTATION OF THE DEFENDANT'S TAXES (R. 99-104) BASED ON THE "NET WORTH STATEMENT" NOTED IN SPECIFICATION OF ERROR 2 ABOVE OVER THE OBJECTIONS OF DEFENDANT'S COUNSEL (R. 97-98) FOR THE REASON THAT THE FIGURES UPON WHICH SUCH TAXES WERE BASED WERE SECURED FROM THE "NET WORTH STATEMENT" WHICH OF ITSELF WAS INCOMPETENT AND NOT ADMISSIBLE, THUS COMPOUNDING THE ERROR PREVIOUSLY COMMITTED IN ADMITTING THE "NET WORTH STATEMENT".

To permit the Government witness, Rex E. Webb, to testify to the computation of Defendant's taxes (R. 99-104) based on the "Net Worth Statement" noted under Paragraph I above over the objections of counsel for the Defendant (R. 97-98) was error unless the "Net Worth Statement" and testimony concerning the same was competent. Once this Court holds with Defendant's contention under Paragraph I above, the witness, Rex E. Webb, was computing

taxes of the Defendant on figures never established by competent evidence. Faced with a similar situation, the Court in *U. S. vs. Fenwick*, 177 F 2d 488, had this to say:

“The weakness of the Government’s position, stressed by Defendant, is the uncertainty of the propriety of the finding of Defendant’s net worth at the beginning of 1943. Of course, before the increased net worth method of proof is effective, the net worth of the taxpayer at the beginning of the tax year must be clearly and accurately established by competent evidence.”

If such testimony as that of the witness, Rex E. Webb, were admissible under such circumstances, there no longer exists any necessity for a “Net Worth Statement” of any kind in the class of cases attempted to be proved by this method.

IV.

THE DISTRICT COURT ERRED IN DENYING DEFENDANT’S MOTION TO DISMISS AT THE CLOSE OF ALL EVIDENCE (R. 198) AS THERE WAS NOT SUFFICIENT EVIDENCE TO PRESENT THE CASE TO THE JURY; THE EVIDENCE DID NOT DISCLOSE THAT A CRIME HAD BEEN COMMITTED; THE EVIDENCE DID NOT PROVE THAT THE SPECIFIC CRIMES CHARGED HAD BEEN COMMITTED; THE EVIDENCE DID NOT PROVE THAT THE DEFENDANT HAD COMMITTED ANY OF THE CRIMES CHARGED. A CONVICTION WILL NOT BE SUSTAINED, BASED ON CIRCUMSTANTIAL EVIDENCE ALONE, WHERE SUCH CIRCUMSTANTIAL EVIDENCE DOES NOT EXCLUDE EVERY REASONABLE HYPOTHESIS OF THE INNOCENCE OF THE DEFENDANT.

THE VERDICT OF JUDGMENT OF GUILTY IS NOT SUSTAINED BY COMPETENT EVIDENCE.

There appears at the bottom of page 141 and continuing on page 142 of the Transcript of Record, the Motion to Dismiss made by counsel for the Defendant at the close of the Government’s case and the renewal thereof at the close of the entire case as the same appears in the middle of page 198 of the Transcript of Record.

Except to state that the entire case of the Government is bottomed on the "Net Worth Statement", the so-called admission of the Defendant contained in Government's Exhibit 11 and the computation of the Defendant's taxes by Mr. Webb, all noted under the preceding paragraphs I, II and III, it serves little purpose to further discuss the foregoing Specification of Errors. If the Government failed to establish a "Net Worth Statement" and the so-called admission of the Defendant (Government's Exhibit 11) and the computation of the taxes were incompetent or inadmissible, no proof of any crime and particularly of the specific crimes charged was established. As stated by the Court in *U. S. vs. Fenwick*, 177 F 2d 488:

"The evidence being circumstantial, must exclude every reasonable hypothesis other than the guilt of the defendant.—the case should not have been submitted to the jury since it did not exclude the hypothesis that the funds in making some of the expenditures might have been from sources other than current business income.

Remembering that the Government has the burden of proof in a criminal case, that the burden never shifts to the defendant, that circumstantial evidence must be of such character as to exclude every reasonable hypothesis except that of guilt, it necessarily follows that, when the Government relies upon circumstances of increased net worth and expenditures in excess of reported income to establish income tax evasion, the basic net worth must be established."

CONCLUSION

It has long been the rule of our criminal courts to exercise extreme caution in affording the accused every protection against conviction based on supposition, speculation and the off-time overzealous efforts of law enforcement agencies. The necessity of affording such protection is strikingly illustrated in the case at hand. The Government herein had the burden of proof, that burden never shifted to the defendant, the circumstantial evidence was

required to be of such character as to exclude every reasonable hypothesis except that of guilt. When the Government relied upon circumstances of increased net worth and expenditures in excess of reported income to establish that the Defendant was guilty of income tax evasion, it was necessary that the basic net worth be established. The Defendant is not compelled to make proof that he is innocent, but, to the contrary, it was necessary that the Government prove him guilty by the evidence beyond all reasonable doubt, and the apparent uncertainty as to whether all assets of the Defendant were included in the Government's computation of net worth completely negates the possibility of guilt herein. Essential proof of no other assets is the cornerstone of the evidence of the Government; that cornerstone being faulty, the whole edifice is so weakened as to be undependable as proof of guilt beyond all reasonable doubt. (*U.S. vs. Fenwick, 177 F 2d 488*).

The complaint is frequently heard that the safeguards and technicalities growing out of the long history of our criminal laws have set many a guilty man free. The obvious answer to this complaint is found in the deep-seated philosophy of our courts to the effect that better ten guilty men go free than one innocent man be imprisoned. The soundness and wisdom of this philosophy is clearly demonstrated in the case of Edward B. Calderon and we respectfully submit that the Judgment below should be reversed and the District Court of Arizona be instructed to dismiss the case.

Dated April 14, 1953.

Respectfully submitted,

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